Muncey, Jr. While suspicion might normally have been cast toward Mr. Muncey because of his reputation in the community for beating his wife, the police investigation focused solely and almost immediately on Petitioner Paul Gregory House, a convicted sex offender who had recently moved to Union County, after a witness claimed to have seen Mr. House on the day following the murder coming up from an embankment near the Muncey home where Ms. Muncey's body was later found. No other suspect, including Mr. Muncey, was ever investigated. Law enforcement collected blood and saliva samples from Mr. House, as well as a pair of muddy blue jeans which were recovered from a laundry hamper in the trailer home of House's girlfriend. These items, together with a sealed Styrofoam box containing four sample tubes of Carolyn Muncey's blood and a vaginal swab taken during her autopsy, and various articles of Ms. Muncey's clothing were placed in a large cardboard box and turned over to Joe Ed Munsey and William Breeding, two local law enforcement agents, who were charged with transporting it by car to the FBI Crime Laboratory near Washington, D.C. After learning that there were blood stains on Mr. House's blue jeans which were consistent with the blood of Carolyn Muncey, the State of Tennessee charged Paul Gregory House with first degree murder.

State Court Proceedings: The trial

The State's case against Mr. House was purely circumstantial. The prosecution had no confession; indeed, Mr. House steadfastly denied killing Ms. Muncey. It had no eyewitnesses. And it had no obvious motive: Mr. House had only recently moved to Union County, and while he had met Ms. Muncey, there was no evidence that he either disliked her or wanted more than a friendship with her.

The prosecution built its case for capital murder around several circumstances, each of

which tended either to place House with the victim on the evening of the crime or impeach his alibi. First, it asked the jury to believe that Billy Ray Hensley's testimony – that he saw House climbing up the embankment very near to where Ms. Muncey's body was found – showed the House was guilty because he, and no one else, knew where her body was located. Further, it asked the jury to conclude that the black rag that Hensley testified he saw House clutching when he first saw him was in fact the blue shirt that he was wearing at the time of the crime, and that House had returned to Ms. Muncey's body to retrieve it so he could not be linked to the crime.

Second, the prosecution asked the jury to find that the stains that appeared on House's pants that were recovered from Donna Turner's clothes bin were Ms. Muncey's blood, *and* that the pants became stained *during* House's struggle to bludgeon and strangle Ms. Muncey. It presented expert testimony from an FBI special agent that informed the jury that lab testing showed that the blood on the pants very likely was Ms. Muncey's blood.

Third, the prosecution presented evidence that the semen stains found on Ms. Muncey's clothing was left by a secretor with House's blood type, and that House was a secretor. This biological evidence also provided a damning, and indeed the only plausible, motive for the crime, *i.e.*, House murdered the victim either to conceal a sexual assault, or in an attempt to force the victim's acquiescence. Moreover, it was the only evidence of sexual assault or even attempted sexual assault which did not require the jury to first assume Mr. House's guilt.

Finally, the prosecution presented evidence that showed that House had lied to law enforcement officials and urged his girlfriend, Donna Turner, to lie about whether House had left the trailer on Saturday evening. It asked the jury to conclude that House had misled the police so they would not find the incriminating pants or place him where he had no alibi.

The defense countered that Mr. House did not commit the crime and that the evidence pointed more truly toward Hubert Muncey. Donna Turner testified that House did not leave the trailer until 10:30 or 10:45. This would have left House insufficient time to travel on foot the nearly two miles to the Muncey home and abduct Ms. Muncey before the Muncey children awoke and walked to their neighbor's home by 11:00. The State's forensic evidence placed the time of death between 9:00 and 11:00 pm. Further the defense attempted to show that Billy Ray Hensley did not see House climbing up the embankment where Ms. Muncey's body was later found and that he actually saw Mr. House on the roadway where Mr. House had admitted to being and where another witness also saw Mr. House.. It was unable to address the State's blood on pants or semen stain evidence, except to argue that the prosecution was negligent not to have tested to see if the semen could be linked to Mr. Muncey. It further argued that because the prosecution failed to satisfy its special burden in a circumstantial evidence case under Tennessee law , *i.e.* it must establish beyond a reasonable doubt that the evidence is consistent with only a hypothesis of guilt, the jury was required to acquit Mr. House.

After deliberations, the jury found Mr. House guilty of capital murder. At the conclusion of the sentencing phase of trial, the jury determined that Mr. House had committed the murder during the course of a rape, attempted rape, or kidnapping, and found two additional statutory aggravating circumstances. The jury sentenced Mr. House to death. The Tennessee Supreme Court affirmed Mr. House's conviction and sentence. *House v. State*, 743 S.W.2d 141 (Tenn. 1987), *House I*.

State Post-Conviction Proceedings

On February 25, 1988, Mr House filed a *pro se* state post-conviction motion asserting,

inter alia, his trial counsel's failure to properly investigate and prepare for the guilt phase of his capital trial and that the State had failed to reveal exculpatory evidence. Counsel was appointed for Mr. House. On August 25, 1988, the day set for hearing on Mr. House's motion, counsel filed an amended petition containing only two jury instruction claims and deleting Mr. House's *pro se* claims. At the hearing, counsel presented no evidence whatsoever and argued only the jury instruction claims. Mr. House made no on-the-record statement that he agreed to waive his guilt phase ineffective assistance of counsel claim. The court dismissed that claim, and also summarily dismissed the jury instruction claims on the grounds that they should have been presented on direct appeal. The decision was affirmed by the Tennessee appellate courts. Certiorari review was denied by this Court. 498 U.S. 912 (1990).

On December 14, 1990, Mr. House, who was by then represented by undersigned's co-counsel in the district court below, filed a second petition for post-conviction relief, challenging not only trial counsel's ineffectiveness, but prior post-conviction counsel ineffectiveness for withdrawing that claim. In response, the State asserted the claims were procedurally defaulted. The State submitted that, because of counsel's prior withdrawal of Mr. House's claim of ineffective assistance of counsel, the petition should be dismissed. The court agreed as did the Tennessee Court of Criminal Appeals. The Tennessee Supreme Court vacated the lower appellate court's decision and remanded it for consideration in light of a new decision. The Court of Criminal Appeals then reversed its prior holding and ordered that Mr. House's case be returned to the trial court to determine whether Mr. House had deliberately and personally waived his ineffective assistance of trial counsel claim during his first post-conviction proceeding. *House v. State*, 1993 WL 97546 (Tenn. Crim.App.) The State then sought review in the Tennessee

Supreme Court. In a decision specifically overruling prior authority which required a personal waiver, the Supreme Court reversed the decision of the Court of Criminal Appeals and affirmed the trial court's dismissal of Mr. House's second petition for post-conviction relief. *House v. State*, 911 S.W.2d 705 (Tenn. 1995), *House II*. This Court denied certiorari review. 517 U.S. 1193 (1996)

Federal Habeas Corpus Proceedings

Mr. House filed a timely petition pursuant 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Tennessee, asserting claims of, *inter alia*, ineffective assistance of counsel and suppression of material exculpatory evidence. Respondent Bell asserted that consideration of these claims was procedurally barred. Mr. House responded that any such bar was inadequate and that based upon the facts alleged, he was entitled to an evidentiary hearing to demonstrate that he was actually innocent and that his claims could nonetheless be considered under the substantial miscarriage of justice exception. The district court determined that the *House II* court's default holding was an independent and adequate state ground for dismissal of the ineffective assistance of counsel and *Brady/Giglio* claims and ordered an evidentiary hearing to determine whether Mr. House could meet the "miscarriage of justice" exception by demonstrating his "actual innocence" as set forth in *Schlup v. Delo*, 513 U.S. 298 (1995).

The District Court Hearing Evidence

Petitioner House presented substantial credible evidence that showed that *each* of the principal pieces of circumstantial evidence relied upon by the jury to convict was either entirely unreliable or strongly suggested that Carolyn Muncey's killer was her husband, Hubert Muncey. The evidence also showed that the State of Tennessee knew, yet failed to reveal, and sometimes

overtly misrepresented, many of these facts.

First, he presented DNA evidence that conclusively established that the semen stains found on Ms. Muncey's clothing were not, as the prosecution urged the jury to conclude, Mr. House's. Apx 800. In fact, the semen stains (upon which the prosecution relied totally to provide an even remotely believable explanation what would motivate Mr. House to walk or run almost two miles, at a rapid rate of speed, up and down the hills of East Tennessee, in the middle of a moonless night) were those of her husband, Hubert Muncey Jr.[1] This new evidence itself raises a colorable showing of innocence. At trial, the defense claimed innocence, asserted that Mr. House had no motive to harm Ms. Muncey, and argued that Mr. Muncey was the likely assailant. This new evidence strongly bolsters Mr. House's trial defense and shows the prosecution's urging the jury to conclude that House was driven by lust to commit the crime was entirely misleading and highly prejudicial.

Second, he presented evidence that Hensley could not have seen House coming up the embankment from the area where Ms. Muncey's body was found as Mr. Hensley had originally claimed. Photographs taken near the time of trial as well as aerial photographs taken during federal proceedings showed that it was physically impossible for Mr. Hensley to have seen Mr. House from his claimed vantage point, much less to have seen him coming up from the embankment, leaving the only credible evidence that of the witness who testified that he had seen a man fitting House's description walking from his car toward the Muncey home.[2]

---

[1] Also introduced at the hearing was a TBI report which showed that Muncey had told law enforcement that he and his wife had had sexual relations on the morning of the crime. This report was not disclosed to the defense prior to or during the trial.

[2] At trial, the prosecutor tried to obfuscate this fact by telling the jury, "[p]hotographs, which we all now, only go so far in showing you the truth - photographs distort distance, and they distort angles, we all know that."

Third, House presented considerable lay and expert evidence to establish that the blood on his pants that the jury was urged to conclude was transferred from Ms. Muncey at the time of the crime was in fact transferred *after* the pants were in the possession of law enforcement. This evidence came from several sources. The most notable of these was the testimony of Dr. Cleland Blake, the Assistant Chief Medical Examiner for the State of Tennessee, a man who had not only previously testified almost exclusively for the prosecution in criminal cases, but had also trained Tennessee law enforcement agents regarding the proper handling of biological evidence. Dr. Blake testified unequivocally that he had determined that because of the similarity of the degradation of the blood stains on Mr. House's blue jeans and that of the blood taken from the sample tubes, the blood stains on Mr. House's blue jeans did not come from the transfer of blood during the crime but from the transfer of blood from the sample tubes taken during Carolyn Muncey's body. Dr. Blake's testimony was partially corroborated by the State's own serology expert, who conceded the soundness of the basic scientific principles upon which Dr. Blake relied.[3] It was further corroborated by, *inter alia*, indisputable photographic and documentary evidence that blood was inexplicably missing from the sample tubes and that this blood had escaped prior to their receipt by the FBI Crime Laboratory and that the Styrofoam box containing the sample tubes was opened during transit to the FBI.

Fourth, House presented evidence from local law enforcement personnel and long time friends of Hubert Muncey, Jr., the victim's violent and abusive husband, that showed that he, not Mr. House, murdered Carolyn Muncey on the night of Saturday, July 13, 1985. Evidence that

---

[3]The State's expert disagreed with Dr. Blake's ultimate conclusion because, while he admitted that these similarities might be significant, he opined that they might also have been the result of simple coincidence.

Hubert Muncey Jr., unlike Mr. House, had the motive and opportunity to kill his wife, and that he actually confessed to having done so.

This evidence showed that Hubert Muncey was known in the community to be a severe alcoholic and wife abuser. Not only had a number of people seen Mr. Muncey strike the victim, she had also been seen a number of times with bruises from a beating to her face and head. A few months before her murder, Mr. Muncey told his friend, Hazel Miller, that he had been in an argument with his wife and was going to get rid of her "one way or the other."

On the evening of the crime, Ms. Muncey was seen with Mr. Muncey outside of the C & C Recreation Center. They argued and a witness saw Mr. Muncey strike her. Ms. Muncey left, alone and on foot. The next morning, Mr. Muncey went to the home of Ms. Artie Lawson. He asked her to say that she had seen him at the dance the night before. This was untrue and Ms. Lawson refused to do what Mr. Muncey had requested. Mary Atkins, the same person who had seen Mr. Muncey hit his wife the night before, was staying nearby at her brother's house and saw Mr. Muncey at Ms. Lawson's house that morning.

Some time before Mr. House's trial, Muncey stopped by the home of a former girlfriend, Kathy Parker. Ms. Parker was there, along with some friends, having a few beers. Also present was her sister, Penny Letner, who was not drinking. Mr. Muncey had been drinking. He had been at the house for a few minutes when he sat down on the couch and started crying. Ms. Parker, who had been drinking herself, recalled that Mr. Muncey said that he had got into an argument with his wife, that he slapped her, that she fell and hit her head, and that he didn't mean to do it. Ms. Letner, who had not been drinking, remembered more of the details of his confession:

> He said that he didn't mean to do it. That she was "bitching him out" because he didn't

take her fishing that night, that he went to the dance instead. He said when he came home that she was still pretty heavily "bitching him out" again and that he smacked her and that she fell and hit her head. He said he didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder.

Ms. Letner stated that she was upset by Mr. Muncey's confession and that she left immediately. Ms. Parker testified that she too was upset and "run [Mr. Muncey] off". Ms. Letner stated that she was a nineteen year old mother at this time and that she was too scared to come forward (Letner habeas hearing testimony). However, Ms. Parker testified that she soon thereafter attempted to tell law enforcement about what she and Ms. Letner had heard, but that they did not appear interested. (Parker habeas hearing testimony 2/1/99, p. 38-39)

In his testimony, Mr. Muncey denied that he was often abusive to his wife; he denied the physical encounter he had with his wife at the C & C Recreation Center; he denied that he killed her; he denied that he asked Ms. Lawson to lie (or that he was even at Ms. Lawson's home the morning following his wife's murder); and he denied that he confessed to Ms. Letner and Ms. Parker. He could not explain why so many people who considered themselves his friends would come into federal court and testify to the contrary.

The District Court ruling

The district court dismissed the petition. Conflating principles announced in *Herrera v. Collins*, 506 U.S. 390 (1993) and *Schlup v. Delo*, 513 U.S. 298 (1995), the court determined that the new evidence did not establish that Mr. House was actually innocent. While the court heard from numerous witnesses, it made few credibility determinations.

The Court of Appeals rulings

The United States Court of Appeals for the Sixth Circuit issued two published *en banc*

decisions in this matter.[4] In each, court members were sharply divided not only on the legal standards that govern this proceeding but on the significance of the new facts to those principles.

In *House v. Bell*, 311 F.3d 767 (6th Cir. 2002)(*en banc*), a six-judge majority concluded that the new evidence created "a serious question or doubt that the defendant is guilty of first degree murder," 311 F.3d at 777, and certified questions to the Supreme Court of Tennessee to facilitate review. *Id.*[5] Judge Gilman issued a dissenting opinion stating that he considered the certified questions unnecessary but would grant sentencing phase relief on the basis of the then-current record. Four other judges also dissented. While conceding that the evidence, "might convince some, or even most, reasonable jurors that Paul House is actually innocent or should not be convicted." *House v. Bell*, 311 F.3d at 780 (Boggs, J., dissenting)(emphasis supplied), these judges believed that Mr. House had failed to meet the requirements of *Schlup* because, in their opinion, *Schlup* allowed them to reach the merits of Mr. House's claims only "if a judge can conscientiously assert that every reasonable juror is almost certain to vote to acquit." *House v. Bell*, 311 F.3d at 783

(Boggs, J., dissenting)(emphasis supplied) Mr. Bell petitioned this Court for certiorari review, which was denied.

At the urging of the State, the Tennessee Supreme Court departed from years of prior practice and refused to answer the certified questions and the matter was returned to the Sixth Circuit Court of Appeals. Thereafter, on October 6, 2004, the Sixth Circuit issued a new opinion

---

[4] An initial panel opinion denying relief, *House v. Bell*, 283 F.3d 737 (6th Cir. 2002), was vacated when the majority agreed to hear the case *en banc*.

[5] Those questions inquired whether state avenues were available to present guilt phase claims of constitutional error to a defendant who has demonstrated his actual innocence, under what combination of constitutional errors a defendant ceases to become death eligible under Tennessee law, and whether Tennessee law provided a state remedy for a person whose lack of eligibility for the death penalty was demonstrated through newly discovered evidence.

affirming the district court's denial of relief. *House v. Bell*, 386 F.3d. 668 (2004)(*en banc*). The eight-judge majority agreed that Mr. House had established a colorable claim of innocence, *House v. Bell*, 386 F.3d at 684, but nonetheless denied relief because it determined that *Schlup* required Mr. House to do more. *Id.* It found that sufficient evidence of guilt remained unaffected by the new evidence to adequately support his conviction. 386 F.3d at 685.

Six judges dissented. They concluded that House's new evidence not only was sufficient to satisfy the *Schlup* gateway standard and thus permit review of House's underlying constitutional claims, they found the evidence presented that rare and extraordinary case where petitioner has provided "a truly persuasive demonstration of 'actual innocence' " which met Justice White's concurring opinion in *Herrera* to establish his innocence of the crime. 386 F.3d at 708-09. Judge Gilman again dissented alone, and wrote that the new evidence "left him in grave doubt as to which of the . . . two suspects murdered Carolyn Muncey." 386 F.3d at 709. He believed that the evidence was sufficient to satisfy *Schlup* and determined that the proper resolution was to grant the writ so that "a new trial would allow a jury to assess House's guilt or innocence free from erroneous introduction of semen evidence, the full knowledge of the controversy surrounding the blood evidence, and with the benefit of the testimony implicating Hubert Muncey." 386 F.3d at 710.

REASONS FOR GRANTING THE WRIT

In the twelve years since this Court decided *Herrera v. Collins*, 506 U.S. 390 (and the decade since it decided *Schlup v. Delo*, 513 U.S. 298 (1995), we have learned a great deal about the fallibility of our system of justice. As a result of increasingly sophisticated forensic tests, exonerations of people charged with or convicted of serious crimes are no longer rare events.[6]

[6] *See* Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003* at 1 (2004)("The rate of exonerations increased sharply over the 15-year period of the study, from about 12 a

Staunch supporters of capital punishment have acknowledged that the alarming number of exonerated death row inmates has given them pause about the application of the ultimate penalty.[7] Late last year, in recognition of the need to prevent and expose wrongful convictions, a bill designed to facilitate access to DNA testing and improve defense representation enjoyed broad bi-partisan support and was enacted by Congress.[8] In his latest State of the Union Address, President Bush extolled the paramount importance of protecting against wrongful convictions.[9]

Paul House presents a compelling case of actual innocence. He has demonstrated that all the physical evidence linking him to the crime for which he has spent the last twenty years on death row was either non-existent or patently unreasonable. He has shown that the purely circumstantial case against him, consisting primarily of the statement of Billy Ray Hensley, is wholly implausible. And he has presented testimony that Mrs. Muncey's husband has confessed to killing her. Nine federal court of appeals judges believe that Mr. House has raised serious doubts about his guilt. *See House*, 386 F.3d at 684, 710. Six more believe that he has proven that he is innocent. *See House*, 386 F.3d at 708. House urges this Court to grant certiorari in his case. Doing so will permit the Court to clarify its holdings in *Schlup* and *Herrera* and elaborate on the standards by which lower courts

---

year through the early 1990s to an average of 43 a year after 2000.").

[7] *See* George F. Will, *Innocent on Death Row*, Washington Post, April 4, 2000; Del. Vincent F. Callahan, Jr., "Virginia Needs A Moratorium On The Death Penalty" The Roanoke Times, Jan. 31, 2002 ("In the past, I have been a strong advocate of the death penalty. However, I have now become one of those who believe that we must take another look at the death penalty. New scientific evidence, such as DNA evidence, has revolutionized all areas of crime detection, criminal prosecution and criminal defense.").

[8] *See* Peter Baker, *Behind Bush's Bid To Save The Innocent*, Washington Post, A09 (Feb. 4, 2005); *see* Bill No. H.R. 3214/S 1700 (Advancing Justice Through DNA Act)(sponsored by Rep. F. James Sensenbrenner and Sen. Orrin Hatch).

[9] *See* Baker, *supra* (quoting Pres. Bush in his State of the Union Address of Feb. 2, 2005: "Because one of the main sources of our national unity is our belief in equal justice, we need to make sure Americans of all races and backgrounds have confidence in the system that provides justice. In America, we must make doubly sure no person is held to account for a crime he or she did not commit.").

should consider claims of actual innocence. A survey of circuit decisions applying *Herrera* and *Schlup* reveals inconsistency and confusion among lower courts about how to use those cases to consider post-conviction claims of actual innocence. The need for this clarification cannot be overemphasized in this era since DNA and other exonerations have shined the light on a "catalog of appalling miscarriages of justice."[10]

I. THE CIRCUITS REQUIRE GUIDANCE ABOUT HOW TO APPLY *SCHLUP* IN CASES LIKE HOUSE'S IN WHICH POST-CONVICTION INVESTIGATION UNCOVERS CREDIBLE EVIDENCE OF ACTUAL INNOCENCE AND RADICALLY UNDERMINES THE CASE PRESENTED TO THE TRIAL JURY.

The sharply divergent approaches of the Sixth Circuit majority and dissenting opinions in House's case reveal a schism that cleaves *Schlup* analysis not only in that court but in other circuits as well. For a decade, the courts of appeals have applied *Schlup* inconsistently to cases with indistinguishable facts. This Court should grant the writ to clarify the *Schlup* standard and give the lower courts much-needed guidance to avoid arbitrariness in resolving claims of actual innocence, especially in capital cases. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

House has presented exactly the kind of evidence specifically cited in *Schlup* as necessary to establishing a "credible" gateway claim of actual innocence, "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324. Post-conviction DNA testing has established that the semen evidence excluded House as a donor and removed the motive the jury was asked to ascribe to him. Moreover, the DNA testing has pointed to the victim's husband, who has through other evidence presented, become a very plausible alternative suspect. Post-conviction testing of the blood evidence established that the victim's blood

[10]Will, *supra*.

ended up on House's clothing not because he bludgeoned her, but because either shoddy packaging allowed the blood to spill or two law enforcement agents deliberately placed the blood onto the clothing during transportation to labs. Further, several witnesses came forward, offering detailed first-hand accounts of the victim's husband both trying to establish a false alibi and confessing to the death of his wife.

The Sixth Circuit majority acknowledged that "[House] has presented a colorable claim of actual innocence" and yet it viewed House's post-conviction evidence in isolation without considering the effect it would have had on a reasonable juror viewing it in its entirety. *House*, 386 F.3d at 684-685. In fact, the majority examined each piece of testimonial and biological evidence singly and opined as to each one why it alone failed to dismantle the case against House. *Id.* (discussing and dismissing the Letner and Parker testimony, Hubert Muncey's attempt to concoct an alibi, the semen evidence, the blood on the jeans, and the absence of blood on House's shoes). As a result, the majority– without ever putting itself in the shoes of House's trial jury-- concluded that House's evidence failed to meet *Schlup*'s "no reasonable juror" standard and therefore fell short of warranting forgiveness of a procedural default. *House*, 386 F.3d at 685. This conclusion flies in the face of *Schlup*'s express requirement that courts evaluate claim of actual innocence in light of all the evidence presented, both old and new collectively. *See Schlup*, 513 U.S. at 328 ("The habeas court must make its determination concerning the petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial.") (internal quotation marks omitted); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986).

Meanwhile, the Sixth Circuit dissent reached the polar opposite conclusion from the majority

and announced that House had not only proffered evidence sufficient to pass through the *Schlup* gateway, but that he had sufficiently undermined the case against him as to warrant his immediate release. *House*, 386 F.3d at 708 ("The new evidence so completely turns the case around that the proof is no longer constitutionally sufficient to warrant a conviction or imposition of the death penalty."). The dissent reached this conclusion by taking a detailed look at the impact House's post-conviction case had on each piece of trial evidence. Reasoning that the trial case against House had been built entirely on circumstantial evidence and that his post-conviction evidence had "disprov[ed] the motive for the crime" and the rape aggravator and "undermin[ed] the main circumstances that gave rise to his conviction," the dissent advocated for overturning House's conviction. *Id.* at 707. The dissent relied heavily on the fact that the prosecution had persuaded the jury that rape had been the motive for House's assault on the victim and that rape had been disproven by the DNA test results showing that the semen belonged to Hubert Muncey. The dissent reasoned that the prosecution's theory of the crime had been dismantled, and therefore House's conviction became invalid. The dissent went on to pointedly criticize the majority for turning a blind eye to this fact. *Id.* at 690-692 ("[T]he State now seems to deny that the semen evidence was introduced at the state trial in 1986 to show that House attempted to rape Carolyn or that rape was the motive offered to the jury for this kidnapping and murder and the basis of the jury's verdict. This argument is simply not consistent with the facts, and the majority opinion does not acknowledge or deal with this problem.").

That judges on the same court, viewing the same record, could reach such sharply divergent conclusions in a capital case highlights the need for this Court to clarify the "no reasonable juror" standard it announced in *Schlup* and to give lower courts guidance on how to apply post-conviction

evidence of actual innocence. In fact, a review of *Schlup* cases in the courts of appeals unearths inter-circuit and intra-circuit splits on several questions confronting courts considering claims of actual innocence : 1) What is the appropriate approach for analyzing old evidence in light of new evidence? Must new evidence of innocence completely neutralize or eliminate the validity of old evidence of guilt, or is it sufficient for new evidence to raise doubt in the minds of the hypothetical "reasonable juror"?; 2) How are courts to evaluate the credibility of old and new evidence? Should judges view the evidence from the perspective of the trial jurors and assess the impact of the new evidence on the evidence the jury heard, or should they substitute their own credibility assessments in considering the weight of both kinds of evidence, or should they take some other approach?; and 3) Is it enough for the petitioner to undermine central aspects of the trial case against him, or must the petitioner present affirmative evidence of innocence in order to pass through the *Schlup* gateway?

This case cries out for clarification of the law. This Court should grant certiorari to instruct the lower courts that when a post-conviction petitioner proffers evidence which discredits the tenets of the trial case against him such that no reasonable juror viewing the old evidence in light of the new would vote to convict, *Schlup* should apply. *See Schlup*, 513 U.S. at 320-321 (emphasizing the "equitable nature of habeas corpus" and stating, "tying the miscarriage of justice exception to innocence . . . accommodates both the systemic interests in finality, comity , and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case.'").

A. IMPACT OF NEW EVIDENCE ON OLD

This Court should grant certiorari to clarify that *Schlup* requires courts to evaluate the impact of the new evidence as a whole on the evidence presented to the jury which convicted the petitioner.

See Schlup, 513 U.S. at 327-328.[11]

The divergent approaches to evaluating new evidence evinces the urgent need for clarification. For example, the Fifth Circuit has held that affidavits from trial witnesses recanting their prior testimony suffice under *Schlup*. *See Wilkerson v. Cain*, 233 F.3d 886, 889, 892 (5th Cir. 2000)("William Riley executed an affidavit in which he recanted his [trial] testimony and stated that he did not witness the killing but, rather, merely related to prison officials what another inmate had told him. Similarly, inmate Charles Lawrence, who testified at the first trial but not the second, executed two affidavits in which he recanted his testimony."); *cf. id.* at 893 (Garza, J., concurring)("The district court must hold an evidentiary hearing to assess the newly introduced affidavits because there are reasons to doubt their reliability."); *see also Fairman v. Anderson*, 188 F.3d 635, 644-645 (5th Cir. 1999)(finding that during post-conviction, trial witness Prewitt signed an affidavit alleging that his trial testimony was the result of police coercion and recanting it and finding that Prewitt's post-conviction testimony established that the petitioner acted in self defense and was therefore innocent pursuant to *Schlup*); *cf. id.* at 647.

A panel of the Sixth Circuit considering a *Schlup* gateway claim recently adopted an approach very different from the *House* majority's piecemeal approach to the evidence in this case. *See Souter v. Jones*, 2005 WL 86477 (6th Cir. Jan. 18, 2005). In *Souter*, the panel held that the petitioner had through the affidavits of several trial witnesses, who recanted central portions of their trial testimony, re-analysis of old physical evidence, and proffered testimony undermining the plausibility of the use of a particular model of beer bottle as the murder weapon, the petitioner had

[11] ("In assessing the adequacy of the petitioner's showing. . . the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.").

met *Schlup*'s innocence standard. The *Souter* court detailed the testimonial, scientific and other physical evidence presented at trial and in post-conviction hearings and concluded that considered holistically, the old evidence viewed in light of the new evidence warranted the conclusion that Souter was actually innocent. *Id.* ("We conclude that this new evidence– the changed testimony of Drs. Bauserman and Cohle, the statements from the bottle manufacturer, the additional evidence of the forensic scientist and police laboratory technician, the photos of the bloody clothes– when taken together chips away at the rather slim circumstantial evidence upon which Souter was convicted.") (internal quotation marks omitted).[12]

In contrast, the Third Circuit has found *Brady* material not turned over at trial in the form of prior inconsistent statements from trial witnesses, eyewitnesses to the crime, insufficient under *Schlup*. *Mattis v. Vaughn*, 2003 WL 22070528 (3rd Cir. Sept. 25, 2003)("On the record, we cannot conclude that the impeachment of Watson's trial testimony with his identification of a different triggerman in the [*Brady* material] would satisfy the *Schlup* standard that no reasonable juror would have found Mattis guilty beyond a reasonable doubt. . . Moreover, Mattis has not established that no reasonable fact finder would have convicted him based on [another trial witness's] testimony alone. At most, Mattis has shown that it is possible that a reasonable juror could have acquitted him in light of the new evidence.").

---

[12]The Ninth Circuit has adopted a similar approach to *Souter*. *See Cooper v. Woodford*, 358 F.3d 1117, 1120 (9th Cir. 2004) (*en banc*). The Court decided that Cooper had met the *Schlup* standard by introducing sworn declarations which "if believed, appear to indicate that a *Brady* violation has taken place and that crucial evidence introduced at trial was not reliable." *Id.* The Court reached this conclusion while acknowledging that evidence that implicated Cooper at trial still remained and was confirmed via post-conviction DNA testing. *Id.* at 1123; *cf. id.* at 1127 (Silverman, J., dissenting)("Viewed against the evidence as a whole, the information that Cooper now urges is not sufficient to establish by clear and convincing evidence that, but for the alleged constitutional errors, no reasonable jury could have concluded that he was guilty even if the [post-conviction evidence] had been available to the defense at trial.").

B. REVIEWING COURT AS REASONABLE JUROR?

Despite *Schlup*'s clear admonition that reviewing courts should not substitute their own "independent judgment as to whether reasonable doubt exists," 513 U.S. at 329, circuits have adopted different approaches to assessing the credibility of new evidence and its impact on trial evidence. The Court should grant certiorari to instruct lower courts that the perspective of the reasonable trial juror is the vantage point from which to evaluate new evidence of actual innocence.[13]

Rather than substituting their own judgment for that of the jury, some courts have put themselves in the jury's shoes and assessed the new evidence as the jury likely would have viewed it at trial. The Third Circuit substituted its own judgment for that of the trial jury in *Mattis* and concluded that at most Mattis had raised reasonable doubt, but that he fell short of showing that no reasonable juror would have convicted him in light of the new evidence. *Mattis*, 2003 WL 22070528 *45. This approach is similar to that of the Sixth Circuit majority in *House*, which viewed the evidence not from the perspective of the jury, but from its own perspective as a reviewing court. *See House*, 386 F.3d at 684-685 ("Moreover, in weighing the new evidence we review the factual findings of the district court for clear error"; "Despite his best efforts, the case against House remains strong. We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."); *see also McKenzie v. Smith*, 326 F.3d 721, 728 (6th Cir. 2003).[14]

---

[13] *See also Jackson v. Virginia*, 443 U.S. 307 (1979)(holding that when reviewing claims that trial evidence was insufficient, "this inquiry does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.")(internal quotation marks omitted).

[14] (finding that the petitioner had met the *Schlup* standard by undermining the credibility of a child witness's hearsay statement, which was the ground for his conviction and stating, "While such

The Fifth Circuit in *Wilkerson* explicitly put itself in the shoes of the jury in assessing the new evidence– an affidavit from an eyewitness recanting his trial testimony-- and determined that in light of the affidavit, the prosecution's trial case would have been significantly weakened in the jury's eyes. *See Wilkerson v. Cain*, 233 F.3d at 890-891, 892 (assuming the validity of the statements in the proffered affidavits and recognizing that the jury was deprived of the opportunity to assess the recanting eyewitness's credibility in light of the affidavits; "Had the jury believed that [the witness] was testifying to curry favor with the state, or that he expected some real or perceived benefit in return, the state's case would have been seriously undermined. Accordingly, it is apparent that there is more than a reasonable possibility that the verdict may have been different."); *cf. Fairman v. Anderson*, 188 F.3d at 648-649 (Jones, J., dissenting)(analyzing new facts offered to prove that the petitioner acted in self-defense and concluding that "Under the majority's ruling, perhaps we will find out what all 'reasonable jurors' would do with this case. I cordially disagree that 'more likely than not,' they will accept Fairman's claim of self-defense.").

In at least one case, the Ninth Circuit has declined to assess the credibility of the new evidence itself and deferred the credibility determination to the district court while concluding that "[the petitioner] has presented sufficient evidence, if credible, to support a finding that he is actually innocent of first degree murder." *Jaramillo v. Stewart*, 340 F.3d 877, 883 (9th Cir. 2003). In so concluding, the Ninth Circuit considered the evidence in light of the other evidence presented to the jury and thereby determined that if the evidence turned out to be credible, the jury's verdict would

---

evidence could certainly be used to add to the prosecution's case, a statement made under circumstances such as those in this case by an 'incompetent' declarant simply does not constitute proof beyond a reasonable doubt. . . [W]e hold– upon the record as a whole– that the petitioner's conviction is not supported by constitutionally sufficient evidence. Although we can understand why a jury would want to convict someone for the crime involved in this case, the proof is neither substantial nor competent enough to let stand the jury's verdict. . . .").

have been different. *Id.* ("The new evidence, if credible, and considered in light of all the evidence, demonstrates that it is more likely than not that no reasonable juror would have convicted Jaramillo of the charged offenses."); *see also Majoy v. Roe*, 296 F.3d 770, 778 (9th Cir. 2002)(quoting *Schlup*, 513 U.S. at 329)("We note also that 'it is not the district court's independent judgment as to whether reasonable doubt exists,' but whether 'in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'"); *Silva v. Wood*, 2001 WL 737591 (9th Cir. June 29, 2001)("The district court erroneously failed to evaluate properly all the evidence, both old and new, relied on by Silva, and in so doing abused its discretion in finding that the new evidence has no import on previous evaluations of the totality of the circumstances")(internal quotation marks omitted).

C. AFFIRMATIVE SHOWING OF INNOCENCE REQUIRED?

Finally, circuit courts have adopted radically different approaches to the question whether *Schlup* requires an affirmative showing of innocence, more than an effective undermining of the prosecution's trial case. The Court should grant certiorari to instruct the lower courts that once the petitioner has produced enough evidence to meet the "no reasonable juror" standard, he should pass through the *Schlup* gateway, regardless of whether the new evidence entirely dismantles the pillars of the prosecution case against him or whether the new evidence affirmatively demonstrates innocence. *See Schlup*, 513 U.S. at 329, 331.

In House's case, the Sixth Circuit majority determined that despite his strong proffer of evidence undermining the prosecution's trial case, because some evidence pointing to House's guilt remained unmolested by the new evidence, he failed under *Schlup*. *See House*, 386 F.3d at 684-685. The majority went out of its way to identify the remaining shred of credibility contained in each item

of evidence which House had undermined through his post-conviction case. *Id.* at 685.[15] The majority held that because House had not debunked every piece of evidence against him, and because there were hypothetically plausible alternative explanations for his new picture of the physical evidence, House had failed to meet *Schlup*'s requirement. This holding seems to suggest that without affirmative proof of innocence absolutely exonerating House of the crime, he could not pass through *Schlup*'s gateway.

The dissent, on the other hand, concluded that because the prosecution's theory of the crime as presented to the jury – that House attacked the victim in order to rape her – had been thoroughly discredited by the DNA evidence, House had succeeded under *Schlup*. *Id.* at 690. The dissent reasoned that *Schlup* is satisfied when the trial case is sufficiently undermined, and that House's evidence was sufficient. *Id.* at 708. The dissent went on to say that House had gone as far as establishing an affirmative case of innocence sufficient to satisfy *Herrera*. *Id.* The dissent's position suggests that a substantial showing short of an affirmative demonstration of innocence will satisfy *Schlup*. *See also McKenzie*, 326 F.3d at 728.

Again, on this question as well as on the preceding two questions, other circuits have reached conclusions different from each of the Sixth Circuit's opinions and different from each other. In *Lucas*, the Fifth Circuit held that six pieces of new evidence "support[ive and] probative of Lucas's claims of innocence" which corroborated the petitioner's alibi defense which had been presented at

---

[15]("House has a deep voice and Laura Muncey testified that the man who came to the trailer on the night of the murder had a deep voice;. . . Regarding House's attacks on the scientific evidence that incriminated him, he has succeeded in showing that the semen attributed to him during the trial was that of Mr. Muncey and that, at some point, the blood evidence appears to have been mishandled. . . However, the fact that the semen found on the victim's clothing came from her husband and not from House does not contradict the evidence that tends to demonstrate that he killed her after journeying to her home and luring her from her trailer, nor does the lack of any physical evidence of sexual contact contradict the notion that the murderer lured Mrs. Muncey from her home with a sexual motive.").

trial were insufficient to establish actual innocence. *Lucas v. Johnson*, 132 F.3d 1069, 1077-1078 (5th Cir. 1998). Yet, in *Fairman*, the Fifth Circuit concluded that an eyewitness who recanted his trial testimony that the petitioner had not acted in self-defense, whose credibility had been credited by the district court, sufficed to meet the "more likely than not, no reasonable juror would have voted to convict" standard. 188 F.3d at 645. There is no logical distinction between the two kinds of evidence presented in *Lucas* and *Fairman*. Both were attempts to present affirmative proof of innocence through the new eyewitness testimony. Nevertheless, the Fifth Circuit reached opposite conclusions in each case. In yet another case, the Fifth Circuit concluded that newly discovered evidence merely impeaching a central trial witness was enough to warrant consideration of the petitioner's underlying claims. *See Wilkerson v. Cain*, 233 F.3d at 891.[16]

The Ninth Circuit has similarly held that new evidence dismantling the prosecution's theory of the crime warranted allowing a petitioner to pass through *Schlup*, thereby not requiring, as the Sixth Circuit majority did in *House*, that the petitioner affirmatively establish his innocence. *Paradis v. Arave*, 130 F.3d 385, 396 (9th Cir. 1997)(discussing the impact of medical records which were *Brady* material never turned over to the defense which strongly suggested that the victim died in neither the time nor the place the prosecution had argued at trial and concluding that "[u]nder such an assessment of the medical evidence, the circumstantial evidence relied upon in Paradis' conviction would be conclusively contradicted by the medical evidence available from the record" and determining that "it may be more likely than not that no reasonable juror would have found

[16] (concluding that new affidavits from recanting eyewitnesses and from the petitioner's co-defendant claiming sole responsibility for the crime showed that "the jury was denied information essential to its assessment of [the central prosecution witness's] believability and, in turn, of the strength of the state's case against the defendant" and warranted an evidentiary hearing in district court).

Paradis guilty beyond reasonable doubt of having killed [the victim] in Idaho")[17]; *see also Jaramillo v. Stewart*, 340 F.3d at 883 (allowing petitioner to pass through *Schlup* gateway without biological evidence but based on new testimony of a previously undisclosed eyewitness).

It is impossible to reconcile these results with one another or with the result the Sixth Circuit majority reached in House's case. These wildly inconsistent results demonstrate the patchwork jurisprudence that has developed in the decade since *Schlup* was decided and the critical need for this Court to clarify that decision. That *Schlup* remains the only practical means by which a habeas petitioner with claims of actual innocence and otherwise procedurally defaulted claims of constitutional error might challenge his conviction makes this clarification all the more urgent.

II. IN A PURELY CIRCUMSTANTIAL CASE IN WHICH NEARLY EVERY INDICIA OF GUILT PRESENTED AT TRIAL HAS BEEN WHOLLY UNDERMINED BY POST-CONVICTION EVIDENCE, IS PASSAGE THROUGH THE *SCHLUP* GATEWAY WARRANTED?

Tennessee courts have long applied the well established rule that when a criminal case is based exclusively on circumstantial evidence, the defendant may not be convicted unless the facts and circumstances are "so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971); *Collins v. State*, 445 S.W.2d 931, 932 (Tenn. Crim. App. 1969); *State v. Transou*,

---

[17] Similarly, in *Cooper*, the Ninth Circuit decided that even though unchallenged biological evidence still linked Cooper to the crime, he had presented sufficient evidence undermining the prosecution's trial evidence to warrant that he pass through the *Schlup* gateway. *Cooper v. Woodford*, 358 F.3d at 1123(allowing Cooper to file a successive petition to prove his *Brady* claim while recognizing that "There was. . . evidence pointing to Cooper's guilt at trial. Salient among that evidence was a spot of blood taken from the hallway in the [victims'] house, the bloody t-shirt, and a hand-rolled cigarette found in the [victims'] . . . car. . . Pursuant to an agreement between Cooper and the State, all three of these pieces of evidence have been subjected to DNA testing. All three resulted in a positive match with Cooper's DNA."). How should Cooper, whose DNA indisputably matched the crime scene evidence, be allowed to pass through *Schlup*, and House, who has presented credible evidence that the only physical evidence linking him to the crime is the result of botched handling of the evidence, not be allowed to so pass?

928 S.W.2d 949, 955 (Tenn. Crim. App. 1996)("[A] conviction for a criminal offense cannot be predicated solely upon conjecture, guess, speculation or a mere possibility that [the defendant] may be guilty."). The Sixth Circuit majority in *House* never acknowledged the "every reasonable hypothesis save guilt" standard, despite *Schlup*'s clear announcement that reviewing courts must consider the way the jury was instructed in assessing the impact of new evidence on the trial case against the petitioner. *See Schlup*, 513 U.S. at 331; *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992)(discussing what Louisiana law required the jury to find in order to sentence the defendant to death).

There is no question that the trial case against Paul House was entirely circumstantial. It consisted of his being seen in the vicinity where the body was found; his having misrepresented his whereabouts the night of the crime; blood on the clothes he was said to have worn the night of the crime; semen containing characteristics consistent with his found on the victim's nightgown; and his status as a stranger in the community with a sex-offense conviction. *See House*, 386 F.3d at 671-672 (quoting *State v. House*, 743 S.W.2d 141, 142-144(Tenn. 1987)("Appellant never confessed to any part in the homicide, and the testimony linking him to it was circumstantial.")); *see also State v. Davidson*, 121 S.W.3d 600, 606 (Tenn. 2003)("All of the evidence regarding Davidson's role in the killing is circumstantial. . . Davidson was a janitor in a hospital department where surgical instruments were cleaned [; the killing involved the use of surgical instruments.] [H]e did not return to work as scheduled after [the date of the crime.] . . In addition, he did not return to his residence . . . for almost three weeks after [the victim's] disappearance. . . There was also evidence that Davidson was in the area where the body was found in the days following [the victim's] disappearance."). However, because at trial he was unable to rebut much of the circumstantial case

against him, House was convicted. (This despite his trial counsel's repeated admonishment of the jury that the prosecution had not proved its case beyond a reasonable doubt.)

House's new evidence has dismantled nearly every piece of circumstantial evidence the jury heard. He has shown that the semen found on the victim was her husband's. He has shown that the blood found on his jeans more likely than not ended up there after it spilled during transportation to the crime lab. He has shown that there is no way Billy Ray Hensley could have seen House where he said he did from the vantage point that he would have had based on Hensley's own description of his whereabouts. The only part of the prosecution's case which remains unchallenged is that House lied to authorities about various details of his alibi and the source of injuries he had sustained around the time of the murder, and that he has a deep voice similar to that described by the victim's daughter as the one she heard on the night her mother disappeared. *House*, 386 F.3d at 685. This surely would not have been enough for the jury to conclude that "the finger of guilt is pointed unerringly at the defendant and the defendant alone[.]" *Crawford*, 470 S.W.2d at 613 (holding that in order to convict on circumstantial evidence alone the facts and circumstances must be so interconnected as to point exclusively at the defendant's guilt). Moreover, House has painted a plausible picture of Hubert Muncey, Jr. as the actual perpetrator of the crime.

The question, then, is when a petitioner's post-conviction case discredits much of the circumstantial evidence relied on by the jury, *and* presents a credible alternative hypothesis for the crime, does *Schlup* require that reviewing courts allow the petitioner to pass through its gateway? The Sixth Circuit dissent opined that it does. *House*, 386 F.3d at 708. *Schlup* strongly suggests that it does. *Schlup*, 513 U.S. at 331 ("Those new statements [exculpating *Schlup*] may, of course, be unreliable. But if they are true . . . it surely cannot be said that a juror, conscientiously following the

judge's instructions requiring proof beyond a reasonable doubt, would vote to convict. Under a proper application of either *Sawyer* or *Carrier*, petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict."). In House's case, the record shows that there no longer remains sufficient evidence to support the jury's verdict, which was required to point to no hypothesis save guilt. Thus, *Schlup* requires that he pass through the gateway. *Id.* This Court should grant certiorari to clarify this requirement in cases like House's in which circumstantial evidence, later discredited, formed the only basis for the petitioner's conviction. *See also Cooper*, 358 F.3d at 1123; *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997); *Jaramillo*, 340 F.3d at 883; *Paradis*, 130 F.3d at 396; *Majoy*, 296 F.3d at 776; *McKenzie*, 326 F.3d at 726; *Souter*, 2005 WL 86477, at *13; *Wilkerson*, 233 F.3d at 892; *Fairman*, 188 F.3d at 645; *but see Lucas*, 132 F.3d at 1078.

III. THE COURTS OF APPEALS NEED CLARIFICATION OF THE STANDARD FOR FREE-STANDING CLAIMS OF ACTUAL INNOCENCE UNDER *HERRERA V. COLLINS*.

In the twelve years since *Herrera* was decided, the actually innocent have been freed from death row in ever increasing numbers. The Court should grant certiorari to announce a standard for *Herrera* claims in light of the growing body of actual innocence cases. As this Court recognized in *Herrera*, it did not announce there the standard that courts are to apply when reviewing free-standing claims of actual innocence. *Herrera*, 506 U.S. at 417; *id.* at 430 (Blackmun, J., dissenting)("Without articulating the standard it is applying, however, the Court . . . decides that this petitioner has not made a sufficiently persuasive case."). Thus, lower courts facing claims by petitioners who assert that they are actually innocent, but who are unable to point to any underlying constitutional violation infecting their trials, have lacked guidance for how to assess such claims or whether such claims

might even form a basis for habeas relief.[18] The confusion is apparent in House's case.

Six judges of the Sixth Circuit opined that House has affirmatively demonstrated his innocence and that he therefore deserves relief under *Herrera*. *See House*, 386 F.3d at 686, 690, 708. The dissenting judges suggested that the court adopt Justice White's proposal in his *Herrera* concurrence that a petitioner aiming to obtain relief upon a showing that he is actually innocent should mirror the standard in *Jackson v. Virginia*, 443 U.S. at 324. *House*, 386 F.3d at 688-89(quoting *Herrera*, 506 U.S. at 429 (White, J., concurring)). Even under this "extraordinarily high" standard, the dissenting judges concluded that House had demonstrated his innocence and deserved immediate relief. *House*, 386 F.3d at 688, 708.

As House and the other *Herrera* cases cited demonstrate, the Court's leaving the *Herrera* standard undefined has had the practical result of leaving even the Courts of Appeals who believe that preventing the execution of one who is actually innocent might be a basis for habeas relief without guidance on what a petitioner must show in order to obtain such relief. *See Whitfield*, 324 F.3d at 1020; *Wilson*, 155 F.3d at 404; *Conley*, 323 F.3d at 14; *cf. Lucas*, 132 F.3d at 1075. As a

---

[18] *See Whitfield v. Bowersox*, 324 F.3d 1009, 1020 (8th Cir. 2003), *vacated in part for other reasons by Whitfield v. Bowersox*, 343 F.3d 950 (8th Cir. 2003), (holding that in order to prevail under *Herrera*, a petitioner must present evidence "unquestionably establishing his innocence"); *Jackson v. Calderon*, 211 F.3d 1148, 1165 (9th Cir. 2000)(holding that *Herrera* does not apply to claims that the petitioner lacked the mens rea for the crime for which he was convicted and that a *Herrera* petitioner must affirmatively show that he is innocent); *Wilson v. Greene*, 155 F.3d 396, 404 (4th Cir. 1998)(same); *Carriger v. Stewart*, 132 F.3d at 476 ("A habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent."); *Cooper v. Woodford*, 358 F.3d at 1124 (same); *Milone v. Camp*, 22 F.3d 693, 705 (7th Cir. 1994)(finding that *Herrera* does not apply to non-capital cases even where the petitioner had made a "credible" showing that newly discovered evidence would exonerate him); *Conley v. United States*, 323 F.3d 7, 14 n.6 (1st Cir. 2003)(noting that "it is not clear whether a habeas claim could be based on evidence *proving* actual innocence" and finding that where the most the petitioner did was to undermine the sufficiency of the evidence on which he was convicted, he did not satisfy *Herrera*); *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999)(stating that *Herrera* held that a claim of actual innocence alone is not a basis for habeas relief); *Lucas v. Johnson*, 132 F.3d at 1075 ("*Herrera* does not overrule previous holdings (nor draw them into doubt) that a claim of actual innocence based on newly discovered evidence fails to state a claim in federal habeas corpus.").

result, no federal habeas petitioner has ever succeeded in convincing a court that he deserved relief for a freestanding claim of actual innocence under *Herrera*. *But see Ex Parte Tuley*, 109 S.W.3d 388, 397 (Tex. Crim. App. 2002)(granting relief on freestanding actual innocence claim in an aggravated sexual assault case in which the complaining witness and another witness provided post-conviction affidavits contradicting the complainant's trial testimony); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 549 (Mo. 2003)(recognizing that state courts reviewing freestanding actual innocence claims may apply a lower standard than federal courts reviewing state convictions implicating such claims because state courts will not be "affected by the federalism concerns" facing federal courts; setting aside petitioner's conviction).

House's case presents a critical opportunity for this Court to revisit its decision in *Herrera* and to announce a standard which will guide courts presented with freestanding innocence claims in capital cases. Though concerns about the finality of convictions remain paramount, increasing numbers of exonerations in the twelve years since *Herrera* was decided strongly militate in favor of presenting courts with a workable framework for reviewing innocence claims, especially in death penalty cases.[19]

Paul House has successfully discredited every piece of physical evidence his trial jury was led to believe linked him to this crime. He has also seriously undermined the circumstantial case against him. He has gone even further and presented an affirmative case of innocence and identified a plausible actual perpetrator. Yet, without this Court's review, House will face death and the lower courts will continue to stumble blindly without guideposts to steer them in cases, like House's,

---

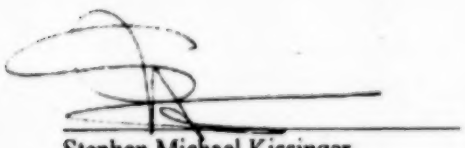
[19] According to the Death Penalty Information Center, there have been 71 exonerations of death row inmates in the years including 1993 through 2004. *See* *http://www.deathpenaltyinfo.org/article.php?did=412&scid=6#inn-vr-rc*

presenting "colorable claim[s] of actual innocence." *House*, 386 F.3d at 684.

CONCLUSION

The petition for a writ of certiorari should issue as to both questions.

Respectfully submitted,



Stephen Michael Kissinger
Federal Defender Services
Of Eastern Tennessee, Inc.
530 South Gay Street Suite 900
Knoxville, TN 37902
(865) 637-7979

Counsel of record for Petitioner

No.

In the Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

CERTIFICATE OF SERVICE

I, Stephen Michael Kissinger, do swear or declare that on the 3rd day March, 2005, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR A WRIT OF CERTIORARI and MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* on each party to the above proceeding or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Jennifer Smith, Office of Attorney General and Reporter, P. O. Box 20207, Nashville, TN 37202, telephone: (615) 741-4349.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 2005.

Stephen Michael Kissinger

(15)

No. 8990

In the Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Stephen Michael Kissinger
Federal Defender Services
Of Eastern Tennessee, Inc.
530 South Gay Street Suite 900
Knoxville, TN 37902
(865) 637-7979

Counsel of record for Petitioner

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 04a0345p.06

UNITED STATES COURTS OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL GREGORY HOUSE,

Petitioner-Appellant,

v.

RICKY BELL, Warden,

Respondent-Appellee.

No. 00-6136

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 96-00883—James H. Jarvis, District Judge.

Argued: March 10, 2004

Decided and Filed: October 6, 2004

Before: BOGGS, Chief Circuit Judge; MERRITT, MARTIN, NORRIS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, Circuit Judges.

COUNSEL

ARGUED: Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Stephen M. Kissinger, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

NORRIS, J., delivered the opinion of the court, in which BOGGS, C. J., SILER, BATCHELDER, GIBBONS, ROGERS, SUTTON, and COOK, JJ., joined. MERRITT, J. (pp. 17-44), delivered a separate dissenting opinion, in which MARTIN, DAUGHTREY, MOORE, COLE, and CLAY, JJ., joined. GILMAN, J. (pp. 45-46), also delivered a separate dissenting opinion.

OPINION

ALAN E. NORRIS, Circuit Judge. Petitioner Paul House appeals from the district court's denial of a writ of habeas corpus, 28 U.S.C. § 2254. A Tennessee jury found House guilty of the murder of a neighbor, Carolyn Muncey, and sentenced him to death.

This court granted a certificate of appealability as to all issues. However, House has limited his brief to a discussion of only two claims: 1) Whether the manner in which the Tennessee courts applied the state

law doctrine of waiver during House's post-conviction proceedings constitutes an adequate and independent state procedural bar to his ineffective assistance of counsel claims; and 2) assuming that the Tennessee courts properly deemed House's claims to be waived, whether that waiver should be excused on the grounds that House has established his actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995). After the Tennessee Supreme Court declined a request by an en banc panel of this court to answer certified questions relating to issues of state law, *House v. Bell*, 311 F.3d 767 (6th Cir. 2002), this court is again faced with the same claims.

Having considered the arguments of the parties regarding the two claims that are before us, we affirm the district court's denial of the writ for the reasons set forth below.

I.

This court reviews a district court's legal conclusions in a habeas proceeding *de novo* and its factual findings for clear error. *See Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999). House initiated this habeas action on September 30, 1996; the petition was amended on September 16, 1997. Consequently, this court's review of the state court's decision is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997).

Because factual determinations by state courts are entitled to a presumption of correctness, 28 U.S.C. § 2254(e)(1), we will describe the factual circumstances surrounding the murder for which House was convicted by quoting from the Tennessee Supreme Court's opinion denying him relief in his direct appeal:

> The victim of the homicide was Mrs. Carolyn Muncey, who lived with her husband and two young children on Ridgecrest Road in rural Union County, Tennessee. Mrs. Muncey was in her late twenties, and her children were about eight and ten years old at the time of her death on July 13, 1985.
>
> In March 1985 appellant Paul Gregory House was released from a prison in Utah and moved to the rural community in which the Muncey family lived. There he resided with his mother and step-father for several weeks, but in June he moved into a trailer occupied by his girl friend, Donna Turner, which was located about two miles from the Muncey home. Appellant did not own an automobile; but he was permitted to drive his mother's car from time to time, and he also drove Ms. Turner's car on some occasions.
>
> Other than doing occasional farm work for his stepfather, appellant does not appear to have been regularly employed. He did not testify at trial at either the guilt phase or the sentencing hearing. He was shown to have had one prior conviction for aggravated sexual assault, a charge to which he pled guilty on March 16, 1981 in Salt Lake County, Utah. Apparently he was placed on parole in that state, and supervision of his parole was transferred to Tennessee when he returned to this state. He was approximately twenty-three years old at the time of the homicide in this case.
>
> Mrs. Muncey disappeared from her home in the late evening of Saturday, July 13, 1985. Her badly beaten body was found on the following afternoon at about 3 p.m., lying partially concealed in a brush pile about 100 yards from her home. Apparently the husband of the victim was not at home during the early part of the evening of July 13. Mrs. Muncey and her children visited a neighbor and left at about 9:30 p.m. to return to their home. Later the older child, Laura, awoke. She testified that she heard a voice which sounded like her grandfather making inquiry about her father. She also heard someone tell her mother that her father had been in a wreck near the creek. She heard her mother sobbing or crying as she left the house. When her mother did not return, the two children went to look for her at neighboring homes. Not finding her, they returned home and waited until their father

arrived. Discovering that his wife was missing, he took the children back to the home of the neighbor where they had visited earlier in the evening and then called for members of his family to look for his wife.

When the body of Mrs. Muncey was discovered the next afternoon, she was dressed in her nightgown, housecoat and underclothing. Her body was badly bruised, and there were abrasions and blood giving every evidence that she had been in a fierce struggle. Apparently a severe blow to her left forehead had caused her death. It appeared, however, that she had also been partially strangled. A pathologist testified that the blow to her left forehead caused a concussion and hemorrhage to the right side of the brain from which she died, probably one or two hours after being struck. He testified that she probably would have been unconscious after having been struck. He estimated the time of her death at between 9 p.m. to 11 p.m. on Saturday, July 13, but emphasized that this was at best a rough estimate.

Appellant never confessed to any part in the homicide, and the testimony linking him to it was circumstantial. There was evidence showing that he knew Mr. and Mrs. Muncey and had been with them socially on a few occasions. Through defense proof there was testimony that Mrs. Muncey and her husband had been having marital difficulties and that she had been contemplating leaving him. There was no evidence to indicate that the appellant was aware of that situation, however, or that there had been any previous romantic or sexual relationship between him and the victim.

On the afternoon of Sunday, July 14, 1985, two witnesses saw the appellant emerge from a creek bank at the side of Ridgecrest Road at the site where Mrs. Muncey's body was later found concealed in the underbrush. He was wiping his hands with a dark cloth and was walking toward a white Plymouth automobile, parked on the opposite side of the road, belonging to his girl friend Donna Turner. The two witnesses spoke briefly to appellant, all of them discussing the fact that Mrs. Muncey had disappeared. Later the two witnesses became suspicious of what they had observed and returned to the point where they had seen appellant emerge from the embankment. Looking down the bank, they found the partially concealed body of Mrs. Muncey. They promptly notified the sheriff.

Appellant later admitted that he had been in the area but denied that he had seen the body of Mrs. Muncey or had any knowledge of its presence. The dark rag which he had been using when first seen was never produced. It was the theory of the State, however, that this was a dark "tank top" or jersey which appellant was shown to have been wearing on the previous evening, July 13.

Appellant gave two statements to investigating officers in which he denied being involved in the homicide. In both of these statements he stated that he had been at Ms. Turner's trailer the entire evening of July 13 and that he had not left until the next afternoon when he went to look for Hubert Muncey after learning of the disappearance of the latter's wife.

On Sunday afternoon various witnesses observed that appellant had numerous scratches and bruises on his arms, hands and body, there being an especially significant bruise on the knuckle of his right ring finger. Appellant explained that these injuries had been sustained innocently earlier during the week, but when Ms. Turner was called as a witness, she said that she had not observed them prior to the evening of July 13. Appellant also told investigators that he was wearing the same clothes on Sunday, July 14 as he had been wearing the previous evening. It was later discovered, however, that a pair of blue jeans which he had been wearing on the night of the murder was concealed in the bottom of the clothes hamper at Ms. Turner's trailer. These trousers were bloodstained, and scientific

evidence revealed that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with appellant's own blood. Scientific tests also showed that fibers from these trousers were consistent with fibers found on the clothing of the victim. There were also found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant.

Some of the most damaging evidence against appellant was given by his girl friend, Ms. Turner. She at first told investigators that he had not left the trailer during the course of the evening of July 13. Later, however, she modified this testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing either his blue jersey or his tennis shoes. The shoes were later found in an area different from the place where appellant told her he had lost them.

Appellant told Ms. Turner that he had thrown away the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him. It was after the appellant's return to the trailer that Ms. Turner first noticed the bruises and abrasions on his hands referred to previously.

Appellant's mother testified that he had not used her automobile on Saturday evening. She testified that during Saturday and Sunday she had been planning to separate from appellant's stepfather and that appellant had been assisting her in her preparations for moving.

At the sentencing hearing the State proved appellant's prior conviction for aggravated sexual assault. Appellant's parents testified that he came from a broken home and had been subjected to stress as a result of that experience. Appellant's mother also testified that in the interval between the guilt trial and the sentencing hearing appellant had attempted suicide. She read into evidence a letter which he had written to her denying his involvement in the homicide. Apparently he had cut his wrists while in the jail awaiting the sentencing hearing, but the degree and extent of the injuries were not detailed in evidence. They do not appear to have been serious and did not prevent his attending the sentencing hearing.

Although the evidence against appellant was circumstantial, it was quite strong. Particularly incriminating was the testimony that he had emerged from an embankment where the body was found, wiping his hands on a dark cloth, without disclosing to anyone the presence of the body. Damaging also were the discovery of his bloodstained trousers and the testimony of Ms. Turner, which a trier of fact could have found sufficient to demolish his alibi and to demonstrate that he had been in a heavy struggle near the time when the homicide must have occurred.[1] A classic case for determination by a jury was presented, and the evidence clearly is sufficient to support the conviction.

Following the sentencing hearing, the jury imposed the death penalty. In their verdict they found that the State had established three aggravating circumstances, these being: (1) appellant had previously been convicted of a felony involving the use or threat of violence to the person; (2) the homicide was especially heinous, atrocious, or cruel; and (3) it was committed while appellant was committing or attempting to commit or fleeing from the commission of rape or kidnaping. T.C.A. §§ 39-2-203(i)(2), (5), and (7).

---

[1] After returning from his "walk," appellant suggested marriage to Ms. Turner for the first time in their relationship. It was at least arguable that he thought by this means her testimony could be rendered inadmissible by the husband-wife privilege.

> There was ample evidence to support all of these findings and to support the conclusion of the jury that no mitigating circumstances had been established which would outweigh the aggravating circumstances. Certainly the sentence of death was not disproportionate to that imposed in other cases in view of the violent and brutal nature of the homicide shown in this record.

State v. House, 743 S.W.2d 141, 142-44 (Tenn. 1987) (footnote in original).

After his conviction and sentence were handed down in February 1986, House took a direct appeal to the Tennessee Supreme Court. The Tennessee Supreme Court affirmed in the opinion just cited. House failed to seek a writ of certiorari in a timely manner.

Post-conviction proceedings began in February 1988 with the filing of a *pro se* petition for post-conviction relief in the trial court. This petition, amended after appointment of counsel, was denied by the trial court on November 29, 1988. Although claims of ineffective assistance of trial counsel were submitted to the court, they were not argued, nor was trial counsel called as a witness at the hearing. Only a single issue was taken to the Tennessee Court of Criminal Appeals: whether a jury instruction improperly misled jurors into believing that they must unanimously find mitigating circumstances. The Court of Criminal Appeals affirmed the conviction on December 15, 1989. The Tennessee Supreme Court denied leave to appeal and the United States Supreme Court denied certiorari.

A second petition for post-conviction relief was filed on December 14, 1990. After conducting hearings, the trial court denied relief on the ground urged by the State: that all the issues presented had either been previously determined in the first petition or, if not, had been waived.[2]

The Court of Criminal Appeals affirmed the trial court's decision on September 2, 1992. However, the Tennessee Supreme Court remanded for reconsideration in light of one of its recent opinions, which it later withdrew. The Court of Criminal Appeals remanded the matter to the trial court for further consideration of the waiver issue. This remand was averted, however, when the Tennessee Supreme Court re-instated the trial court's initial denial of the second petition for post-conviction relief. *House v. State*, 911 S.W.2d 705 (Tenn. 1995). Critical for this habeas action is the Court's holding concerning waiver:

> We conclude that a "full and fair hearing" sufficient to support a finding of previous determination occurs if a petitioner is given the opportunity to present proof and argument on the petition for post-conviction relief. We further conclude that the rebuttable presumption of waiver is not overcome by an allegation that the petitioner did not personally and therefore, "knowingly and understandingly," waive a ground for relief. Instead, waiver is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney. Finally, we conclude that there is no right to effective assistance of counsel in post-conviction proceedings, and therefore, an allegation of ineffective assistance of prior post-conviction counsel does not preclude application of the defenses of waiver and previous determination.

Id. at 714. Because of its holding, the Tennessee Supreme Court re-instated the trial court's original denial of relief.

---

[2] We note that throughout the proceedings in this case, the Tennessee courts have consistently used the term "waiver" to include the inadvertent loss of a right or privilege. As indicated in opinions by the United States Supreme Court, the term "waiver" ordinarily refers to a specific species of loss of right or privilege, namely, an intentional relinquishment or abandonment of a known right or privilege. Inadvertent, unintentional losses are normally covered under the broader term "forfeiture." See *United States v. Olano*, 507 U.S. 725, 733 (1993) (citing *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J. concurring)). Although forfeiture is the customary term for the kind of loss of right or privilege ascribed to House in the Tennessee courts, because we are describing state law, and the state courts claimed to be applying a "waiver" doctrine, we have labeled House's loss of right or privilege a "waiver" as well.

House filed a *pro se* habeas petition on September 30, 1996, which was eventually amended after the district court granted *in forma pauperis* status and appointed counsel. The district court granted the State's motion for summary judgment on the majority of claims in an order entered June 25, 1998. In February 1999, it conducted an evidentiary hearing on House's claim that the procedural default of his ineffective assistance of counsel claims was excused because he could establish his actual innocence. After considering post-hearing briefs of counsel, the district court denied habeas relief. It also denied a certificate of appealability, a denial which was later superseded by this court's grant of a certificate as to all issues.

Although a certificate of appealability had been granted as to all issues, House has raised only two issues in his briefs to this court: 1) whether the Tennessee state courts applied the state waiver rule in such a way that it constituted an adequate and independent state ground that procedurally defaulted his ineffective assistance of counsel claims; and 2) whether, if his ineffectiveness claims were procedurally defaulted, he had made a sufficient showing of his actual innocence of the crime, permitting him to revive them. On March 11, 2002, a three-judge panel of this court issued an opinion rejecting House's claims and affirming the district court's denial of the writ. *House v. Bell*, 283 F.3d 737 (6th Cir. Mar. 11, 2002) (withdrawn). That opinion was vacated when a majority of the active judges of the court voted to rehear the case en banc. On November 22, 2002, following oral argument, the en banc court issued an opinion certifying questions of state law to the Tennessee Supreme Court. *House v. Bell*, 311 F.3d 767 (6th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 937 (2003). The Tennessee Supreme Court declined to answer the questions. *House v. Bell*, No. M2003-01952-SC-S23-CQ (Tenn. Nov. 24, 2003). Following the issuance of that order, we requested additional briefing and argument from the parties prior to rendering this decision.

II.

The first issue House has raised on appeal involves his contention that both the Tennessee courts and the district court erred when they concluded that his claims of ineffective assistance of counsel were procedurally barred.

Initially, the district court deferred granting summary judgment to the State on the claims of ineffective assistance of counsel because "these claims are intertwined with the petitioner's claim of actual innocence." Memorandum Opinion, June 25, 1998, at 41. It went on to provide the following rationale:

> [T]he court will be unable to determine whether the claims should be barred on the ground of procedural default until the conclusion of the evidentiary hearing. *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 1611, 140 L.Ed.2d 828 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'") Accordingly, in addition to petitioner's claim of actual innocence, the court will consider [the ineffective assistance of counsel claims].

Id. at 41-42. However, after conducting an evidentiary hearing and determining that House had failed to establish actual innocence, the district court held that House's ineffective assistance of counsel claims were "barred on the ground of procedural default." Memorandum Opinion, February 16, 2000, at 46-47.

House concedes that an adequate and independent state-law ground can procedurally bar subsequent habeas claims. This circuit has developed a four-part analysis to determine whether a claim is barred:

> Under *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), this circuit utilizes the following four-part analysis when the state argues that a federal habeas claim has been procedurally defaulted in state court: (1) whether there is a procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to follow the rule; (2) whether the state courts actually enforced the state procedural rule; (3) whether the state procedural rule is an adequate and independent state ground to foreclose federal relief; and if so (4) whether

the petitioner has established cause for his failure to follow the rule and prejudice by the alleged constitutional error.

White v. Schotten, 201 F.3d 743, 749 (6th Cir. 2000).

House points to the tortured path that his case took in the courts of Tennessee and argues that no hard and fast rule existed to procedurally bar his *pro se* ineffective assistance of counsel claims. Specifically, he points to the following paragraph of the opinion of the Tennessee Supreme Court:

> *Our research has revealed no reported Tennessee case dealing directly with the issue of the appropriate standard to apply when determining whether an issue has been waived.* Courts in other states have split on whether to apply a subjective or objective standard and provide us little assistance because their decisions were based largely on the particular state statutory procedure. However, Tennessee cases dealing generally with the concept of waiver in the post-conviction context apply an objective standard and impute the conduct of counsel to their clients. *See, e.g., Caruthers v. State*, 814 S.W.2d 64, 70 (Tenn. Crim. App. 1991); *State v. Bishop*, 731 S.W.2d 552 (Tenn. Crim. App. 1986).

House, 911 S.W.2d at 713 (emphasis added) (footnotes omitted). In House's view, this opinion illustrates that no rule had been clearly established.

We do not write on a clean slate with respect to this issue. *See Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), *rev'd on other grounds*, 535 U.S. 685 (2002); *see also Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998). In *Cone*, this court made clear that the *House* opinion that House relies upon merely explained existing state law. The petitioner in that case contended that he had not personally waived a challenge to a jury instruction. In rejecting his claim, we explained:

> First, we are aware of two cases in which courts have considered whether a petitioner is bound by his attorney's waiver of a constitutional claim, *Coe*, 161 F.3d 320, and *House v. State*, 911 S.W.2d 705 (Tenn. 1995). The *House* court stated that "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." *House*, 911 S.W.2d at 714. *House* does not appear to announce a new standard, as Cone suggests. Rather, it seems merely to affirm Tennessee's standard of review.
>
> In *Coe*, as we explained earlier, this court held that the petitioner had procedurally defaulted his state claim that the trial court failed to give a correct malice instruction. He presented the claim for the first time in his second petition for post-conviction relief rather than his first petition, as a consequence of which the Tennessee Court of Criminal Appeals found it had been procedurally waived. *Coe*, 161 F.3d at 329-31. This court cited *House* when determining that Coe had defaulted his claim under an "objective" standard of waiver. However, the petition upon which the court relied in finding the default was filed before *House* was decided. Thus, concerning defaults that occurred before *House* was decided, the Tennessee courts have strictly and regularly applied the traditional standard of waiver, whether the waiver is made by counsel or the petitioner personally.
>
> . . .
>
> Last, we are not persuaded that Cone is correct in his claim that Tennessee law was in a state of confusion on whether an "objective" or "subjective" standard of waiver is appropriate. It is not clear from the Tennessee cases that procedural default may not be charged to a petitioner who has not himself "knowingly and understandingly" waived timely assertion of a federal constitutional claim when his attorney has done so. We are satisfied

> that Tennessee follows the traditional rule that a petitioner is chargeable with his attorney's failure to timely assert a claim and with the consequences of failing to do so.

Cone, 243 F.3d at 974. We find this reasoning dispositive of the issue before us and accordingly conclude that the district court was correct when it determined that House's ineffective assistance of counsel claims had been procedurally defaulted.

III.

We now turn to House's other claim. House argues that even if his ineffective assistance of counsel claims have been procedurally defaulted, he has established his actual innocence of the crime for which he was convicted, a showing which, if made, revives his ineffectiveness claims. In *Schlup v. Delo*, 513 U.S. 298 (1995), the Supreme Court held that a petitioner must show either cause and prejudice or a miscarriage of justice in order to obtain habeas review of an otherwise procedurally defaulted claim. House seeks to invoke the miscarriage of justice exception here. With respect to a miscarriage of justice, a petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime." *Schlup*, 513 U.S. at 324. The Court explained the nature of this exception as follows:

> Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty. Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful. Even under the pre-*Sawyer* regime, "in virtually every case, the allegation of actual innocence has been summarily rejected." The threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing.
>
> Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent.

Id., 513 U.S. at 324-25 (footnote and citation omitted). The Court cautioned that this exception is rare and should be applied only in the extraordinary case, concluding that, "[t]o establish the requisite probability [that a petitioner is actually innocent], the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.*, 513 U.S. at 327.

Because the district court conducted an evidentiary hearing on this issue, there is testimony about events beyond that which was presented during the original trial. House contends that this new evidence is sufficient to establish his actual innocence. We will summarize that evidence and the district court's response to it before explaining why, in our view, House has failed to show that it is more likely than not that no reasonable juror would have convicted him.

House testified for the first time at the evidentiary hearing. He offered this version of the night of murder: "I went for a walk. I got jumped, ran around, came back." He went on to explain that the terrain was hilly and that it was dark:

> I had only been walking about maybe 20 minutes at the most it seems like. A truck pulled up behind me with. I remember it as being like a 4-wheel drive. It sat up high, you know.

> Headlights were on. It had lights across the roof of the cab and they were on. I couldn't see anything other than that about the truck. . . . I turned around and I kept walking. I believe there were at least two guys in the truck. I know the driver got out on his side, one guy got out on the passenger side. I couldn't really discern it, but I think there was one other guy in the cab. The driver came up. I can remember he said something, but I don't even know if I heard him correctly at the time. He grabbed me by the arm.
>
> He started to jerk me around. I turned around and threw him back with my left hand. I hit him. He let go. I started running. I ran kind of diagonally across the road into some trees, bushes, whatever it was. I heard a shot, at least one. There might have been two. I am not sure. I ran around through those woods for a while. I don't know how long. When I came back out—I believe at one point I ran to the right, once I got into the woods, and started heading back. . . . I went back across the road up to Donna's house. When I got, I stepped on something, a sharp rock or something. I knew I stepped on it. When I looked down I only had one shoe. I lost one of them while I was running. I took the other one off and threw it across the road.
>
> . . . .
>
> I didn't even notice my shirt was gone until I got up to the trailer.

As the factual summary of the Tennessee Supreme Court attests, this version of events is relatively consistent with the one presented by Donna Turner during the trial. When asked why he initially lied to investigators by telling them he had not left the trailer at all, House responded, "I was on parole. I didn't want to draw attention to myself."

In short, House's testimony merely restates a scenario presented to the jury that had convicted him. Moreover, the district court, which had the opportunity to assess House's demeanor, found his testimony to be less than credible.

During the evidentiary hearing, House devoted considerable time to the trial testimony of Billy Ray Hensley, the witness who saw House near the spot where the body was discovered. Specifically, House introduced maps and photographs in order to show that Hensley could not have seen what he purported to see from the place where he claimed to have been.

At trial, Hensley testified that his wife received a telephone call at about 2 p.m. on July 14 that Mrs. Muncey was missing. He drove to the Muncey trailer and talked to some of the family members. He then "went to check on [his] tobacco." After visiting his fields, he ended up on Bear Hollow Road, which was near where the Munceys lived.

He then had an encounter with House, which he described in these terms:

> [J]ust before I rounded the curve of Ridgecrest, whatever the name of that road is, I saw Mr. House come out from under a bank, wiping his hands on a black rag. And I went on down to Little Hube's[3] driveway. I pulled up in the driveway where I could see up toward Little Hube's house and I seen Little Hube's car wasn't there, and I backed back out in the road, and come back towards to the Dump Road, that is what I call it. And that is when Mr. House flagged me down. . . .

The two then had a short conversation about the fact that Mrs. Muncey was missing. House was driving his girlfriend's white Plymouth.

---

[3] "Little Hube" was the nickname of the victim's husband, Hubert Muncey.

After leaving, Hensley became suspicious and, along with his friend Jackie Adkins, returned to the spot where he thought House had emerged: "I said—right along here is where I saw [House], and I got out and was looking off the bank, and [Adkins] got out and walked around the car and he said—oh, my God."

On cross-examination, Hensley conceded that he could not have seen House while he was actually "down in the embankment." He would have first seen him at the top of the bank. Defense counsel also tried to bring out some inconsistencies in Hensley's statements concerning precisely when and where he first saw House. On re-direct, the prosecution attempted to have Hensley clarify:

> Q. Let me ask you if this is a true statement—"I travelled about 500 feet on Ridgecrest Road when I saw a '66 or '67 white Plymouth sitting on the left-hand side of Ridgecrest Road," is that true?
>
> A. That's true.
>
> Q. Is that where you saw the car?
>
> A. Yes, sir.
>
> Q. Is this true? "I saw a man later identified to me as Paul G. House enter the roadway from the right-hand side of the road?"
>
> A. He was walking toward the road, yes.
>
> Q. All right. "And he was coming up over the bank and he had a rag in his hand and he was wiping his hands." is that true?
>
> A. That's true.
>
> . . . .
>
> Q. The estimation [of the distance on the road] that you have given, that you were pressed for, is that an accurate measurement or is that an estimate on your part?
>
> A. That is just an estimate.

The exhibits introduced by House during the evidentiary hearing were designed to show that Hensley could not have seen House coming up the embankment. However, even if we accept House's contention that Hensley could not have seen him until he emerged onto the road, it is undisputed that House was seen in the general vicinity of the body carrying a black rag. Moreover, trial counsel effectively cross-examined Hensley regarding his inconsistent statements about when and where he saw House. Thus, in our view, House's attack on Hensley's testimony advances his cause little, if at all.

In addition to presenting his own version of events while attempting to cast doubt on the accuracy of Hensley's testimony, House takes aim at the physical evidence that linked him to the crime.

Dr. Alex Carabia performed the autopsy of Mrs. Muncey's body. He testified at the trial that death was caused by a blow to the left side of her head. Mrs. Muncey died about an hour and a half after she was hit.

At trial, photographs of the bruises on House's body were entered into evidence and three witnesses testified about his physical condition. Prior to his arrest, House provided various accounts of their origin, attributing them to a mysterious fight on the night of the murder and to tearing down a shed a few days earlier. During closing argument, the prosecution emphasized these inconsistent statements.

Also at trial, FBI Agent Paul Bigbee testified that the blood samples taken from the victim were degraded. Nonetheless, the blood found on the jeans was consistent with that of the victim and not with that of House.

At the evidentiary hearing, House mounted a concerted challenge to this evidence.

Four vials of blood were taken from the victim during the autopsy. These were placed in a styrofoam container, which was sent from the Tennessee Bureau of Investigation (TBI) to the FBI. House referred to two demonstrative exhibits in the district court: photographs of the styrofoam container viewed from above and from the side. The container was sealed with tape by the TBI in both directions for shipping. The photograph of the side view shows that one of the seals was broken and then resealed by a second layer of tape. FBI Agent Bigbee placed his lab number on the second layer. The first layer of tape is incomplete; it only covers the lid of the container. Agent Bigbee conceded that it was possible that the first seal had been cut before the second seal had been placed over it. To support the theory that the container was opened between the time it left the TBI and arrived at the FBI, House points to the fact that the label on the container indicated that it held both blood and vaginal secretions. Yet, Agent Bigbee received the secretions separately in a manila envelope.

As mentioned above, four vials of blood were sent to the FBI. According to Agent Bigbee, he would have used one fourth of a vial in testing. House's trial serology expert, Howard Bragdon, took a photograph when he received the styrofoam container from the FBI. In House's view, the photograph shows that one of the vials was only one-half full and another was nearly empty. Furthermore, despite Agent Bigbee's testimony to the contrary, it appeared that some of the blood had spilled, although there is no evidence indicating that the spillage had occurred before the FBI received the blood.

At the evidentiary hearing before the district court, Dr. Cleland Blake, Assistant Chief Medical Examiner for the State, examined the results of the FBI tests of the blood found on the blue jeans and also the blood taken from Mrs. Muncey's body at the autopsy. He theorized, based upon the degree of the enzymatic degradation, that the blood on the blue jeans came from known samples, such as the blood contained in the vials, and not from Mrs. Muncey's body. When confronted with this conclusion, Agent Bigbee was doubtful, noting that the extent of enzymatic degradation could vary greatly from specimen to specimen taken from the same source depending upon the manner in which the specimens were handled after being extracted from the source, and upon other individual circumstances. To bolster Blake's conclusion, House asserted that the locations of the blood stains on the jeans were unlikely to have been caused by a struggle between House and the victim. The five stains were found on the outside left leg, on the inside left thigh, on the inside right pocket, outside the right pocket, and on the right cuff, respectively.

An expert on blood spatter analysis, Paulette Sutton, also testified at the evidentiary hearing. She testified, contradicting House's assertion, that the pattern of some of the blood spots on House's jeans was consistent with transfer stains resulting from blood being wiped onto them, that some of the stain patterns demarcated folds, and that the rest of the stains were consistent with spatter. She also noted, however, that some of the blood stains on the jeans were mixed with mud, although the photographs of the crime scene showed no mud present. Furthermore, National Weather Service records show that it had not rained for three days prior to the murder. Finally, there was no mud on the victim's nightgown.

Finally, House notes that no blood was found on the tennis shoes that he was wearing on the night of the murder. Charles Burks, House's trial attorney, also testified at the evidentiary hearing. The district court summarized his testimony on the issue of the tennis shoes as follows:

> During the evidentiary hearing, Mr. Burks reviewed a report from the Forensic Services Department of the TBI, which referred to Mr. House's tennis shoes and indicated the absence of blood on the tennis shoes. Mr. Burks did not recall having seen that report before. That would have been relevant to Mr. Burks because, although there was blood on